# RE MAT ALI HANAFIAH MOHAMED, EX P ASIA COMMERCIAL FINANCE (M) BHD

HIGH COURT MALAYA, KOTA BHARU
IDRIS YUSSOF J
[BANKRUPTCY NO: 29-889-1994]
19 NOVEMBER 2000

***CIVIL PROCEDURE:*** *Appeal - Notice of - Time frame for filing notice against registrar's decision to judge in chambers - Appeal in relation to bankruptcy proceeding - Governing provision - Whether O. 56 r. 1(3) Rules of the High Court 1980 or r. 86 Bankruptcy Rules 1969*

***BANKRUPTCY:*** *Practice and procedure - Appeal - Notice of appeal - Time frame for filing notice against registrar's decision to judge in chambers - Governing provision - Whether r. 86 Bankruptcy Rules 1969 or O. 56 r. 1(3) Rules of the High Court 1980*

Following a creditor's petition filed by the judgment creditor ('JC'), the Senior Assistant Registrar ('SAR') made receiving and adjudication orders against the judgment debtor ('JD'). The JD then filed a notice of appeal against the decision of the SAR. The JC raised a preliminary objection on the validity of the notice of the appeal, contending that it was time barred by virtue of O. 56 r. 1(3) of the Rules of the High Court 1980 ('RHC'). That was because as the decision of the SAR was given on 8 October 1997, the notice of appeal that was filed on 16 October 1997 was filed three days after the time frame for filing such notice. The JD submitted that the notice of appeal was well within the time frame specified for such appeal by virtue of r. 89 of the Bankruptcy Rules 1969 ('the Rules').

**Held:**

**[1]** Rule 89 of the Rules is in respect of appeals **from** the High Court and not from the registrar **to** the High Court (which includes the judge in chambers). It followed that the said rule is not intended to apply to appeals from the registrar's decision to the judge in chambers.

**[2]** With the amendment to r. 276 of the Rules *via* PU(A) 60/93, as from 1 April 1993, the RHC in the absence of any rule regulating the proceeding in the Bankruptcy Act or Rules applies *mutatis mutandis*. Therefore, O. 56 r. 1(3) RHC will apply to appeals against the registrar's decision to the judge in chambers. Accordingly, the notice of appeal filed by the JD was time barred.

*[Appeal dismissed.]*

**Legislation referred to:**
Rules of the High Court 1980, O. 56 r. 1(3)
Bankruptcy Rules 1969, rr. 5(1), 18, 89, 276

*For the JD - C Jegathesan; M/s C Jegathesan*
*For the JC - Mahamidah; M/s HS Lim & Malik*

*Reported by Usha Thiagarajah*

## JUDGMENT

**Idris Yusoff J:**

Receiving and adjudication orders were made by the senior assistant registrar (SAR) on 8 October 1997 against the judgment debtor (JD) following a creditor's petition filed by the judgment creditor, Asia Commercial Finance (M) Bhd (JC). Being dissatisfied with the said orders JD filed a notice of appeal to the judge in chambers on 16 October 1997. When the appeal came on for hearing before me JC's counsel indicated that she intended to raise a preliminary objection on the validity of the notice of appeal and that notice of such intention had been conveyed to JD's counsel. I then made an order requiring counsel for both parties to file written submissions on this preliminary objection.

In their submissions JC's counsel contends that the instant appeal, being an appeal to the judge in chambers is governed by O. 56 of the Rules of High Court 1980, and of particular relevance is r. 1(3) which states:

> 1.(3) Unless the Court otherwise order, the notice must be issued within 5 days after the judgment, order or decision appealed against was given or made and served not less than 2 clear days before the day fixed for hearing the appeal.

Since the decision of SAR was given on 8 October 1997 JC's counsel submits that the notice of appeal is not valid, it being filed on 16 October 1997, three days after the time frame fixed for filing such notice. She claims that r. 89 of the Bankruptcy Rules 1969 does not apply and thus requests the court to reject the notice and dismiss it with costs.

On the other hand counsel for JD disagrees with such contention and claims that the notice of appeal was filed well within the time frame specified for such appeal as r. 89 applies. It is the submission of JD's counsel that r. 89, after its amendment through PU(A) 60/93 which came into force on 1 April 1993 remains unaffected and hence effect must be given to it.

It is to be pointed out that before the amendment through PU(A) 60/93 came into effect all bankruptcy matters and applications as listed out in r. 5(1) of the Bankruptcy Rules with the exception of para (a), were heard before the judge in open court. Only upon the coming into effect of PU(A) 60/93 r. 5 was amended which, amongst others, confers powers on the registrar to hear and determine any matter or application in chambers unless otherwise directed by the chief justice. As a result, some consequential amendments are required to be made to some of the rules e.g. r. 18 and r. 276.

Rule 18 as it presently stands requires that unless directed by the Chief Justice, every application to the court shall be made by summons in chambers supported by affidavits to enable such application to be heard by the registrar as compared to the said rule as it stood prior to the amendment, requiring such application to be made by motion supported by affidavit, thereby only enabling the judge to hear it in open court.

Another rule which is pertinent to this appeal is r. 89. For convenience, reproduced hereunder is r. 89 of the Bankruptcy Rules 1969:

> 89 Appeals
>
> The provisions and procedure for the time being in force respecting appeals from the High Court in its ordinary civil jurisdiction shall apply to appeals in bankruptcy with the following modifications:
>
> (a) The Official Assignee shall not be required to give security for costs.
>
> (b) The time for entering the appeal and serving notice thereof on the respondent shall be fourteen days from the date of the signing, entering or otherwise perfecting the judgment or order appealed from.
>
> (c) No appeal shall operate as a stay of proceeding under the judgment or order appealed from unless the court otherwise directs.

It will be observed that r. 89 is not affected by the amendment in 1993 and the said rule was incorporated in the original text when the Bankruptcy Rules 1969 first came into being when all matters and applications came before the judge in open court and the judge's decisions were appealable to the Federal Court in accordance with the provisions and procedures therein laid down respecting appeals from the High Court in its ordinary civil jurisdiction. By virtue of r. 89 such provisions and procedures are applicable in toto to appeals in bankruptcy for there being no qualifying words such as "where applicable" or "*mutatis mutandis*" in r. 89. It will be noted that such provisions and procedures are comprehensive but need not be wholly applicable to an appeal to judge in chambers for some of the provisions are not relevant. In fact

emphasis needs be placed on the expression "respecting appeals **from** the High Court" and not "**to** the High court" (which includes judge in chambers) and it seems to me that r. 89 is not intended to apply to cases in respect of appeals from the registrar's decision to the judge in chambers.

The appeal to the judge in chambers in bankruptcy matters are broadly exercised following the amendment to r. 5 of the Bankruptcy Rules for prior to that such matters were triable by the judge in open court. Hence it is absurd to argue that r. 89 is also intended to govern such matters as appeal to judge in chambers for when it was first introduced in Bankruptcy Rules 1969, it is thought not within the contemplation of the rules committee for a need to make provisions for appeal to judge in chambers as the situation then did not entail to have one. Only upon the extention of the jurisdiction in bankruptcy to the registrar to hear any matter or application would it only require to have such provisions and procedure. In the circumstances I am of the view that r. 89 is to be invoked only when there is further appeal to the higher court from the decisions of the judge in chambers.

Counsel for JD also refers to the pre and post amended r. 276 of Bankruptcy Rules. Rules 276 before the amendment reads:

> 276. Save as provided by these Rules, the Rules of the Supreme Court regulating the procedure in its civil jurisdiction shall not apply to any proceeding in bankruptcy.

While the said rule after the amendment reads:

> 276. In the absence of any rule regulating any proceeding under the Act or these Rules, the Rules of the High Court shall apply, *mutatis mutandis*.

The amended r. 276 came into effect on 1 April 1993 via PU(A) 60/93. Now as from 1 April 1993, the Rules of the High Court 1980, in the absence of any rule regulating the procedding in the Bankruptcy Act or Rules applies *mutatis mutandis* whereas prior the the amendment, the Rules of the Supreme Court 1957, the precursor of the Rules of the High Court 1980, regulating the procedure in its civil jurisdiction, did not apply unless otherwise provided for by the Bankruptcy Rules. To my mind, the amendment to r. 276 is to cater for such situation as in this present appeal - thereby O. 56 r. 1(3) of the Rules of the High Court 1980 applies in cases of appeal against the Registrar's decision to the judge in chambers.

Accordingly I hold that the notice of appeal filed by the judgment debtor (JD) on 16 October 1997 is time barred and therefore the notice is rejected. The appeal is dismissed with costs